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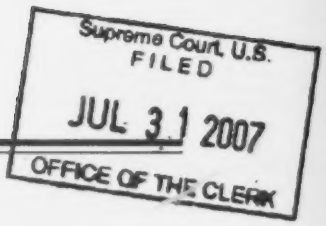

In The

Supreme Court of the United States

LAURA MERCIER,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to The Supreme Court of Ohio

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This Court's decision in *Wyoming v. Houghton* allows for the search of a passengers purse if officers have probable cause to search the automobile. Mercier was the passenger in a car when the driver sold undercover officers a pound of marijuana immediately before the car was stopped and searched. Does *Houghton* allow Mercier to remove a container from the scene of a valid automobile search?

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OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 117 Ohio St.3d 1253, 885 N.E.2d 942, 2008-Ohio-1429. The unpublished opinion of the Court of Appeals, First Appellate District, Ohio can be found at the Ohio Supreme Court's website http://www.sconet.state.oh.us/rod/newpdf/default.asp. The citation is 2007-Ohio-2017. The opinion is also available through Westlaw at 2007 WL 1225858. The Hamilton Co. Ohio, Court of Common Pleas order denying the motion to suppress is unreported.

JURISDICTION

Mercier claims jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Mercier argues that a purse being held by a passenger is protected from search as part of the

passenger's "outer clothing"during an otherwise valid automobile search. She bases this contention on Justice Breyer's concurrence in *Wyoming v. Houghton*, 526 U.S. 295 (1999). But this argument is flawed for two reasons.

First, Justice Breyer's concurring opinion is just that – a concurring opinion. The opinion of the Court in *Houghton* makes no such distinction about where the purse is located. In fact, the majority's opinion rejects such artificial tests based on purported ownership of the purse. Instead, the majority opinion adopts a bright-line rule that is easily understood and applied by law enforcement in the field.

Secondly, even Justice Breyer's concurrence does not necessarily mandate the rule proposed by Mercier. Justice Breyer qualified the issue by saying that the location of the purse does not "automatically" make a legal difference. He then continued to note that the purse *might* be entitled to additional protections. From this "might," Mercier claims the argument is decided in her favor.

A more reasonable interpretation is the one adopted by the Ohio Supreme Court. Namely, that the majority opinion in *Houghton* has decided the issue. This court should decline jurisdiction and let *Houghton* stand.

Procedural Background:

The Hamilton County Grand Jury charged Laura Mercier, with Aggravated Drug Possession. Mercier filed a motion to suppress evidence of drugs found in

her purse. The motion was overruled by the trial court.

Mercier subsequently pled no contest to the offense. The trial court found her guilty and sentenced her to three years of community control, suspended her driver's license for a year, and levied a $250 fine. Mercier's sentence was stayed pending her appeal

The Ohio First District Court of Appeals reviewed Mercier's claim that her motion to suppress should have been granted. The First District rejected that claim.

Mercier then asked this The Ohio Supreme Court to exercise its discretion and review that decision. It did. In a 5-2 decision the Ohio Supreme Court summarily affirmed the decision below. The majority's opinion states that this Court's opinion in *Wyoming v. Houghton*, 526 U.S. 295 (1999), mandated its decision.

Factual Background:

In July of 2005 Laura Mercier was a passenger in a car with Charles Hagedorn, her co-defendant, as he went to sell a half pound of marijuana. Once they arrived at the parking lot where the deal was to take place, Hagedorn pulled in next to the buyer's car. Hagedorn then got out and went around to the passenger's side of his car. There he completed the sale through the driver's side window of the buyer's car. All the time, Mercier remained in the car while a drug transaction was taking place a couple feet away from her.

But unfortunately for the pair, the buyer was a confidential informant. He was wearing a wire and police officers were listening and recording the conversation. After completing the sale, Hagedorn got back in his car and drove away. Approximately one to two minutes later, police pulled over Hagedorn's car, with Mercier still in the passenger seat.

When questioned, Hagedorn admitted to Lt. Chris Zumbiel that there was still some marijuana in his vehicle, even after the sale. Hagedorn even handed some marijuana to the officer at that point. Lt. Zumbiel removed Hagedorn from the vehicle, placed him under arrest and secured him in the back of a police cruiser.

After arresting Hagedorn, the police approached Mercier, who had been in the car throughout the investigation, stop, and arrest. Because the police were going to seize Hagedorn's car based upon the felony drug sale, they asked Mercier to step out of the car as well. When she exited, Lt. Zumbiel told her to leave the purse in the car. Zumbiel then looked in the purse during his search of Hagedorn's car. That search recovered four Adderall pills that form the basis of Mercier's charge.

While testifying, Lt. Zumbiel stated that he searched the purse, in part, because Mercier had been in the vehicle at the time of the drug transaction and in close proximity to the location of the drugs in Hagedorn's car. Furthermore, in deciding to search Mercier's purse, the officer considered the fact that Mercier was in the back of the police cruiser, had been and was going to continue to be in close proximity to

himself and other officers, and was going to be given back her purse. Accordingly, he decided to search the purse for the safety of the officers, in addition to the previously articulated reasons.

REASONS FOR DENYING WRIT

Mercier argues that the evidence discovered in the search of her purse should have been suppressed. She contends that while a passenger's personal belongings in the car may be searched incident to the arrest of the driver, a passenger's purse may not be. She bases her argument on the theory that a women's purse is a part of her person or clothing rather than a container.

There are at least three reasons for this Court to reject Mercier's argument. First, such a holding would run counter to the rationale behind *New York v. Belton* and *Wyoming v. Houghton*, namely this Court's expressed need for a bright-line rule for police officers in the field to follow. Secondly, a purse is a container that can easily conceal the object of a search, such as a weapon or contraband, rather than a part of the passenger's person. Finally, as a public policy matter, allowing the passenger to take an item out of the search area effectively guts the authority granted to officers in *New York v. Belton*.

History of Search Incident to Arrest

In a long line of Fourth Amendment case law, including *New York v. Belton*, the this Court addressed the proper scope of a search of an automobile incident to the arrest of its occupants. The precedent set by the Court illustrates the Court's preference for a bright-

line rule concerning acceptable automobile searches under the Fourth Amendment. The scope of a search incident to arrest descends from the Court's decision in *California v. Chimel*, where it held that officers may search the area surrounding a defendant "from within which he might have obtained a weapon or something that could have been used as evidence against him.[1] The *Chimel* court recognized that officer safety and preservation of evidence provided "ample justification" for officers to extend their search beyond the person of the defendant, noting "[a] gun on the table or in a drawer in front of one who is arrested can be as dangerous to the arresting officers as one concealed in the clothing."[2]

***New York v. Belton* and the Need for a Bright-Line Rule**

The Court then extended the provisions of *Chimel* to automobiles in *New York v. Belton*. In *Belton*, the Court realized that "[t]he protection of the Fourth and Fourteenth Amendments 'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement'."[3]

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[1] *Chimel v. California*, 395 U.S. 752, 768, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

[2] *Id.* at 762-763.

[3] *New York v. Belton*, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981) quoting, LaFave, "Case-By-Case Adjudication"

The Court recognized that the

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field'.[4]

In short, what is needed is "[a] single, familiar standard...to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."[5] It is axiomatic that "[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his

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Versus "Standardized Procedures": The Robinson Dilemma, 1974 S.Ct.Rev. 127, 142.

[4] *Id.*, quoting, LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 S.Ct.Rev. 127, 141.

[5] *Id.*, quoting, *Dunaway v. New York*, 442 U.S. 200, 213-214, 99 S.Ct. 2248, 2256-2257, 60 L.Ed.2d 824 (1979).

constitutional protection, nor can a policeman know the scope of his authority."[6]

With the need for a single, familiar standard in mind, the Court in *Belton* held that when there is a lawful custodial arrest of the occupant of an automobile, the police officer may search the passenger compartment of that automobile. The Court expounded further, stating that prior case law "suggest[s] the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]'."[7] It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will any containers in it be within his reach.[8]

The Court, in an accompanying footnote, defined container to include "closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well

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[6] *Id.* at 460, 101 S.Ct., at 2864.

[7] *Id.*, quoting, *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040.

[8] *Id.*; See Also *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.E.2d 572 (1982).

as luggage, boxes, bags, clothing, and the like."[9] The Court reiterated its position in *Knowles v. Iowa*, stating "[t]he authority to conduct a full field search as incident to an arrest was a bright-line rule which was based on the concern for officer safety and the destruction of evidence, but which did not depend in every case upon the existence of either concern."[10]

The *Belton* bright-line rule, and exception to the warrant requirement, was adopted by the Ohio Supreme Court in *State v. Murrell*.[11] In *Murrell*, the Ohio Supreme Court discussed this Court's reasoning and noted that "[i]t follows [from Chimel] that the police may also examine the contents of any container found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach,***Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have."

Moreover, the Ohio Supreme Court pointed out that the "*Belton* court **purposely** determined to craft a bright-line rule...", and that it must be acknowledged that there are "advantages of having a bright-line rule

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[9] *Id.* at 460-461, 101 S.Ct. at 2864.

[10] *Knowles v. Iowa*, 525 U.S. 113, 118, 119 S.Ct. 484, 488, 142 L.Ed.2d 492 (1998).

[11] *State v. Murrell*, 746 N.E.2d 986, 992 (Ohio 2002).

in such situations."[12] The Court noted the obvious advantages of a bright-line rule, stating that the "*Belton* court reached a calculated conclusion that a search of the motor vehicle incident to arrest.....is a reasonable one, justified principally by concerns for officer safety and preserving evidence."[13]

Despite Mercier's contention to the contrary, several courts have applied *Belton* to authorize the search of a passenger's personal effects incident to the arrest of the driver of the vehicle. A number of these courts sustained the search of a passenger's purse found in the vehicle following the arrest of the driver despite the absence of the passenger's consent to search.[14] In *Staten v. United States*, the court explained that the need for police to discover either hidden weapons which could be used against them or evidence which could be destroyed is no less crucial simply because a person other than the arrestee owns the "container" in which those items might be located. In fact, because of the number of people involved, the need may even be greater; third party ownership of a

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[12] *Id.*

[13] *Id.*

[14] *State v. Fladebo*, 779 P.2d 707, 711 (Wash. 1989); *State v. Moore*, 619 So.2d 376, 377 (Fla. 1993); *State v. Loftis*, 568 So.2d 121, 122 (Fla. 1990); *People v. McMillon*, 892 P.2d 879, 883 (Colo. 1995); *State v. Clarke*, 822 P.2d 138, 140 (Or. 1991); *People v. Prance*, 277 Cal.Rptr. 567, 572 (1991); *People v. Mitchell*, 42 Cal.Rptr.2d 537, 540 (1995). *See also United States v. Morales*, 923 F.2d 621, 626 (8th Cir. 1991); *Johnson v. Grub*, 928 F. Supp. 889, 908 (Mo. 1996).

container would not prevent the arrestee from gaining access to those items.[15]

In addition, this Court again addressed the issue of automobile searches in *Wyoming v. Houghton*, this time addressing the right of police to search items belonging to passengers in an automobile. The Court held that police officers with probable cause to search a vehicle may also inspect the property of passengers that may contain the object of the search.[16]

As noted in *Wyoming v. Houghton,* a criminal might be able to hide contraband in a passenger's belongings, with or without the passenger's knowledge or permission. Therefore, Justice Scalia commented that "[t]he sensible rule (*and the one supported by history and case law*) is that such a package may be searched, whether or not its owner is present as a passenger or otherwise, because it may contain the contraband that the officer has reason to believe is in the car."[17] In balancing the competing interests, the Court found that neither *Belton* nor *Ross* makes "a distinction among packages or containers based upon ownership. When there is probable cause to search for contraband in a car, it is reasonable for police officers like customs officials in the founding era to examine packages and containers without a showing of individualized probable cause for each one. A passenger's personal

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[15] *Staten v. United States*, 562 A.2d 90, 92 (D.C. 1989).

[16] *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S.Ct. 1297, 1304, 143 L.Ed.2d 408 (1999).

[17] *Id.* at 307, 119 S.Ct. at 1304.

belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are 'in' the car, and the officer has probable cause to search for contraband *in* the car."[18] It is well accepted that "passengers, no less than drivers, possess a reduced expectation of privacy with regard to property that they transport in cars..."[19]

The common rationale in the case law since *Chimel*, both in this Court and the Ohio Supreme Court, is a preference for utilizing bright-line rules to aid and guide officers in the performance of their duties. But, Mercier now urges this Court to toss aside previous precedent, to blur that bright-line rule, and submerge appellate courts in a transcendental debate about what is or is not a container.

Purse as a Container v. Article of Clothing

Mercier trumpets Justice Breyer's concurrence in *Houghton*, where the issue of a woman's purse was specifically addressed.[20] At the outset, it is important to note that the concurrence stops well short of advocating a distinction between purses and other types of clothing. Indeed, Justice Breyer stated in his concurrence: "I cannot argue that the fact the container was a purse *automatically* makes a legal difference, for the Court has warned against trying to

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[18] *Id.* at 302, 119 S.Ct. at 1301.

[19] *Id.* at 303, 119 S.Ct. at 1302.

[20] *Houghton* (Breyer Concurring) at 308.

make that kind of distinction."[21] Instead, Justice Breyer merely suggests that a purse, if attached to a woman's person similarly to a man's billfold, *might* amount to "outer clothing" and would hence receive greater protection. Mercier has embraced Justice Breyer's suggestion and now asks this Court to extend it to its most extreme form.

This argument was considered, and rejected, by the majority opinion in *Houghton*. There, the Court drew a distinction between the intrusion suffered as part of a *Terry* body search and the diminished intrusion suffered by the examination of personal property found in an automobile.[22] The Court specifically cited to language from *Terry*, stating "[e]ven a limited search of the outer clothing...constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."[23] The Court then distinguished the situation in *Houghton* from that in *Terry*, noting that the "traumatic consequences" associated with a pat-down search of the outer clothing of a suspect are not found with the search of a piece of personal property separate from the suspect.[24]

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[21] *Id.*

[22] *Id.* at 303, 119 S.Ct. at 1297.

[23] *Houghton* at 303, quoting *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

[24] *Id.*

Despite this language in *Houghton*, Mercier attempts to analogize a "purse in the lap" to a man's billfold. If accepted, this argument would blur the bright-line rule that has been established by both this Court. Adoption of Mercier's argument would serve only to complicate the currently settled state of the law regarding automobile searches, and would open a floodgate of questions, such as those asked by the Ohio First Appellate District: "Would police be permitted to search a purse that was on a passenger's lap, over her shoulder, between her feet, on the floor near her feet, hanging from the back of her seat, or in some other location?"[25]

Mercier argues that the location of the purse and the proximity to the passenger should be determining factors for distinguishing the current matter from the holding in *Houghton*. But when examined more closely, such a distinction between a purse and any other container is unfounded.

Mercier notes that purses "carry personal effects" and that a search of such would present a "great intrusion to the privacy of the owner." Although Mercier is dismissive of the *Houghton* majority's comparison of briefcases and purses, purses are far from the only items that contain personal effects. Men's briefcases frequently carry such personal items as identification, scheduling planners, address books, personal digital assistants, and wallets. Gym and duffel bags frequently carry the an individuals

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[25] *State v. Mercier*, Hamilton App. No. C-060490, 2007-Ohio-2017 ¶17.

personal items including clothing recently worn or about to be worn, wallets, cell phones, and other items unsuitable for possession while engaging in physical exercise or activity. Backpacks and knapsacks are frequently the repository of personal effects for school children, minors, and college students. And, what about diaper bags? Are we to now abandon years of case law and settled precedent regarding the search of containers in automobiles and not allow *any* container to be searched based upon ownership and location? This is precisely what the *Belton* court sought to avoid.

The inescapable conclusion to be drawn from all these hypotheticals is that a purse is no less a container than any other item that holds personal effects. The ability to search such a container should be bound by whether it can hold the object of the search rather than outdated notions that a woman's purse requires more protections than a similar item held by a man. The Fourth Amendment is not gender specific. To hold that a purse held by a woman is entitled to more protection than the same container held by a man may be politically correct, but such an argument is constitutionally indefensible.

Public Policy Reasons

Finally, as the Ohio First Appellate District noted in its opinion, there are several public policy reasons for not crafting a rule exempting a passenger's purse from search.[26] Not the least of these is preventing the

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[26] *Mercier* at ¶ 18.

destruction of evidence and protecting the officer's safety.

Here, Mercier was the passenger in a car as her co-defendant drove to a parking lot to sell drugs. She sat in the car as Hagedorn sold a half pound of marijuana literally feet from her. After Hagedorn's car was stopped, he offered up more drugs secreted in the center console just inches from Mercier. Given these facts, Mercier tacitly knew of the sale of drugs, if she was not a confederate in the drug sale. Crafting a rule that allows a passenger's purse to be exempted from search would give drug dealers a recipe to avoid confiscation of their product. It makes the passenger's purse a veritable "lock box" for drug dealers - immune from an otherwise constitutional search.

Under such a rule, all a drug dealer would need to do is keep his contraband in a passenger's purse. Then if stopped, the passenger and her purse would be exempt from search and the evidence of the crime would simply exit the car with the passenger. And what is to keep the passenger in this scenario from claiming multiple purses that she gets to remove? Under Mercier's rule, officers would not even be able to check the purse or purses to ensure it belongs to the passenger. Further, the rule would certainly apply to cases in which a car carries multiple passengers. Is each allowed at least one container upon exiting the vehicle?

As these scenarios illustrate, such a rule eviscerates the search authorized by *Belton* and *Houghton*. Anytime a passenger gets to leave with a container which could carry the object of the search,

the purpose of preserving the evidence is lost. Mercier's proposed rule would completely frustrate one of the rationales used by this Court in *Belton*.

Additionally, such a rule would also endanger police officers. Here, another reason Lt. Zumbiel gave for wanting to check Mercier's purse was because he was placing her in the back of his cruiser and was concerned the purse could contain weapons. In *Belton,* this Court noted that preventing defendants access to concealed weapons was another justification for such a search. A rule that exempts passengers' purses from search means that the officers have no way of knowing whether the passenger who has been removed from the vehicle is armed or not. Such a holding disregards the officer's need to provide for his own safety in light of the dangerous nature of the situation.

Consequently, a holding that exempts a passenger's purse from search would allow for the destruction of evidence and increase the risk to officers' safety. These two valid public policy reasons were the exact rationale this Court used to justify the search in *Belton*.

CONCLUSION

For years, this Court has sought to establish bright-line rules to inform officers when a search of an automobile is allowed. Adoption of Mercier's argument would cast doubt on such a rule and is contrary to the rationale of this Court in *Belton* and *Houghton*.

Additionally, a purse is a container just as any other item capable of holding personal effects. It is

entitled to no special constitutional protections as urged by Mercier.

Lastly, a rule allowing the passenger of a car in a *Belton* type search to remove items from the car effectively destroys the purpose behind such a search. Public policy requires that for the preservation of evidence and officer safety, officers should be allowed to search any containers passengers attempt to remove from the car before exiting.

For all these reasons, this Court should decline jurisdiction.

Respectfully,

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